BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWIN FORNES	)	
Claimant	)	
VS.	)	
	)	Docket No. 234,871
GIVENS CLEANING CONTRACTORS, INC.	)	
Respondent	)	
AND	)	
	)	
OHIO CASUALTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier requested review of the Award dated October 9, 2000, entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on April 18, 2001.

APPEARANCES

Claimant appeared by his attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This proceeding is brought pursuant to claimant's Application for Review and Modification filed January 13, 2000. Claimant seeks an increase in the Agreed Award entered October 15, 1999 in which the permanent partial disability compensation was based upon claimant's stipulated 10 percent permanent impairment of function. The ALJ modified the Agreed Award to a 57.5 percent work disability effective October 25, 1999. Judge Benedict arrived at the 57.5 percent permanent partial disability by averaging a 79 percent task loss with a 36 percent wage loss.

On review respondent contends that modification should be denied and claimant's benefits should be limited to his percentage of functional impairment because he voluntarily quit an accommodated job with respondent that paid him a comparable wage. Respondent agrees with the ALJ's finding that the claimant did not make a good faith effort to obtain employment after he left his accommodated job with respondent. But, respondent argues claimant demonstrated an ability to do that job and, therefore, its comparable wage should be imputed.

Claimant contends that the Award entered by the ALJ should be affirmed.

FINDINGS OF FACT

After reviewing the record, considering the briefs and hearing the parties' arguments, the Board finds that the ALJ's Award should be affirmed and adopts the findings and conclusions of the ALJ as its own.

Claimant started working for respondent in 1989 as a custodian. On June 17, 1998 claimant was vacuuming a church. He picked up the vacuum to carry it downstairs when he got tangled in the cord and fell, injuring his low back.

Claimant was initially treated by Dr. Donald Morgan. On October 25, 1998, an L4-5 discectomy and fusion surgery was performed by Dr. John Ebeling. Respondent thereafter referred claimant to Dr. Delgado for a permanent impairment rating and restrictions. Follow-up care was authorized with Dr. Scott W. Burk. Dr. Ebeling, who did not testify, had imposed permanent restrictions on May 6, 1999 of limiting lifting to 50 pounds and to avoid repetitive lifting and bending.

Claimant returned to an accommodated, part-time job with respondent in March 1999 and returned to full-time work in June or July of that year. But claimant began to experience additional complaints with his back and leg. Certain job tasks were taken away. Claimant sought additional medical care and eventually was taken off work by Dr. Burk. When claimant attempted to return to work with respondent, he was told that he had been replaced.

Since his termination, claimant has worked a total of approximately two weeks, doing clerical work for a tax preparer. Claimant's job duties mostly involved photocopying tax returns. He was paid minimum wage. Otherwise, his job search efforts between the time he left respondent in October 1999 and when he testified at the hearing on August 9, 2000, consisted of applying at two places.

The record contains the testimony of two physicians, Dr. Burk and Dr. Delgado. Dr. Delgado initially saw claimant on June 28, 1999 at respondent's request. He examined claimant again on May 17, 2000. The doctor found claimant's symptoms had worsened and that his ability to do work had diminished between the two visits. In his June 28, 1999

report, Dr. Delgado imposed restrictions to avoid lifting in excess of 25 pounds repetitively, avoid excessive bending and twisting and, if possible, alternate sitting and standing. Dr. Delgado rated claimant with a 10 percent whole body impairment. In his May 17, 2000 report, Dr. Delgado said: "Mr. Fornes would best be served avoiding activities as a janitor, unless rigid accommodations are provided to avoid bending, stooping, prolonged standing or any lifting, particularly from floor level." He reviewed a task list prepared by Monty Longacre and opined that claimant had lost the ability to perform 15 of the 19 tasks, for a 79 percent loss.

Dr. Burk testified that as of November 9, 1999 he did not think claimant could return to his job as a custodian and that was still his opinion when he testified on March 27, 2000. Dr. Burk opined that claimant could not perform 17 of the 19 tasks listed by Mr. Longacre which results in a 90 percent task loss. The Board agrees with the ALJ that the task loss opinion given by Dr. Delgado is the more credible.

CONCLUSIONS OF LAW

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute,[3] but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[4]

Because claimant could not perform the accommodated job with respondent, was eventually taken off that job by an authorized treating physician, and thereafter did not refuse an offer of other accommodated work from respondent, Foulk is not implicated. Claimant attempted to return to work with respondent, but the accommodations in the job were not sufficient to prevent re-injury or worsening of his condition. The Kansas Court of Appeals' holdings in Guerrero[5] and Bohanan,[6] not Foulk or Lowmaster,[7] govern the facts of this case and support claimant's right to a work disability award based upon respondent's inability to supply him with comparable post-injury wage employment tailored to prevent him from aggravating or worsening his physical condition.

The Kansas Court of Appeals has stated that in order to avoid a work disability claim, employers must extend an offer of work post-injury that pays comparable wages and the work must truly reside within the claimant's restrictions and physical limitations.[8] Failure to provide work residing within the claimant's restrictions entitles claimants to seek alternate employment without sacrificing a work disability claim. As in the case of Oliver,[9] which clarified Lowmaster, respondent had clear notice concerning continuing physical difficulties. Claimant made a decision to temporarily leave work. This decision was

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[3] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

[4] Copeland at 320.

[5] Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[6] Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[8] *See* Bohanan and Guerrero.

[9] Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ___ Kan. ___ (1999).

subsequently supported by the authorized treating physician, thus justifying his decision to leave his work and establishing that he has met his burden of good faith under Foulk and Copeland.

Claimant here is not like the claimant in Foulk, who would not even attempt to perform an accommodated job extended by the employer. As with the claimant in Guerrero, Mr. Fornes attempted to work within his restrictions. Notwithstanding attempts to limit his activities to prevent further aggravation or injury, Mr. Fornes' symptoms worsened to the point where he was forced to leave work. Thereafter, respondent failed to offer further accommodations or to take claimant back in any capacity.

The Kansas Court of Appeals' decision in Copeland does not support the respondent's argument for wholesale denial of claimant's work disability claim. Copeland does not demand a denial of any work disability claim if a finding is made that employees not returning to their pre-injury employer did not thereafter engage in a "good faith effort" to find comparable wage employment. Rather, Copeland dictates that a wage will be "imputed" to the claimant using the information available in the record and expert testimony, where appropriate. In applying Guerrero to the facts in this case, it was reasonable for claimant to temporarily leave a job which was causing his symptoms to worsen. Having justifiably left the accommodated job, however, his post-injury wages should not be based upon his actual earnings, or a 100 percent loss. Instead, under Copeland a wage should be imputed using the available facts and testimony because claimant thereafter failed to make a good faith effort to find appropriate employment.

The Award of the ALJ determined that claimant failed to make a good faith effort to find appropriate employment. The Board agrees. The ALJ then imputed the federal minimum wage to claimant for the wage loss prong of the work disability test. The Board agrees with this too. Claimant testified that the only job he has performed since being terminated by respondent paid minimum wage. There is little evidence concerning claimant's transferable job skills or what his present ability is to earn wages. His job with respondent was an accommodated job, not a job he could expect to find in the open labor market. Furthermore, claimant testified he could not perform some of those duties and even those limited duties made his symptoms worse. Accordingly, because claimant's ability to earn wages post injury does not equal 90 percent of his pre-injury average weekly wage, a work disability award is appropriate. The Board finds that claimant has met his burden of proving a 36 percent wage loss and a 79 percent task loss which combine for a 57.5 percent work disability.

AWARD

WHEREFORE, the Board finds the Award dated October 9, 2000, entered by Administrative Law Judge Bryce D. Benedict, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Douglas D. Johnson, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director